Supreme Court, U.S.
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No. 99-1994

In The

Supreme Court of the United States

STATE OF NEVADA; WILLIAM MOLINI; RICH ELLINGTON; MICHAEL SPENCER; BILL FITZMORRIS,

Petitioners,

v.

FLOYD HICKS; TRIBAL COURT IN AND FOR THE FALLON PAIUTE-SHOSHONE TRIBES; JOSEPH VAN WALRAVEN, HON.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENTS THE TRIBAL COURT IN AND FOR THE FALLON PAIUTE-SHOSHONE TRIBES AND THE HONORABLE JOSEPH VAN WALRAVEN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does an Indian tribal court have jurisdiction under federal law over civil actions arising on the trust allotment land of a tribal member and brought by the tribal member against state officials in their individual capacities for alleged violations of federal civil rights and tribal tort law?

2. Assuming that there is tribal jurisdiction, are the merits of the officials' claimed federal law affirmative defenses of absolute and qualified immunity subject to exhaustion in tribal court?

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STATEMENT OF THE CASE

Floyd Hicks is an enrolled member of the Fallon Paiute-Shoshone Tribe. The Tribe is a federally recognized Indian tribe that exercises its sovereignty according to a federally approved Constitution. The Tribe has about 918 members. The Tribe's Reservation, located in western central Nevada, consists of about 8,000 acres. At least since the Reservation was established, this land has been held continually by the federal government in trust for the Tribe and for individual tribal members. *See* Act of Apr. 30, 1908, 35 Stat. 70, 85; *see also* U.S. Department of the Interior, Bureau of Indian Affairs, Office of Trust Responsibilities, *Annual Report of Indian Lands* 23 (Sept. 30, 1985). The Reservation has never been disestablished, diminished, or opened by act of Congress.

This case arises out of two separate but related incidents which indisputably occurred within the Reservation on Hicks' trust allotment. On August 30 1990, Nevada State officials entered the allotment, conducted a search, and seized Hicks' aged, mounted big horn sheep's head. Pet. at 3. On June 13, 1991, the Officials again entered the allotment, searched Hicks' residence, and seized another of his aged, mounted big horn sheep's heads. *Id.*

The Officials – Michael Spencer, Rich Ellington, and Bill Fitzmorris – are or were Game Wardens employed by the Nevada Department of Wildlife. They were investigating Hicks for an alleged crime under Nevada law occurring off the Reservation – the unlawful possession or killing of a big horn sheep of the California subspecies. Pet. at 3. Based on information obtained in January 1989

from a "Confidential Informant," the sheep was allegedly "freshly killed" in June 1988. Pet. App. at E-1 – E-2.

The first incident began when Spencer executed an affidavit and applied for a state search warrant. Pet. App. at E-1 – E-2. A State Court issued the warrant with the explicit caveat that, "[t]his Court has no jurisdiction on the Fallon Paiute-Shoshone Indian Reservation and, before any search is conducted in furtherance hereof, an approval authorizing same must be obtained from the Fallon Tribal Court in and for the Fallon Paiute-Shoshone Tribes." Pet. App. at G-1.

The Tribal Court approved the warrant with the express condition that any search be limited "to exterior premises only and to vehicles thereon." Pet. App. at G-1. Accompanied by a tribal police officer, Spencer entered Hicks' trust allotment. After a search, Spencer seized from Hicks' vehicle a forty year old, mounted sheep's head of the Rocky Mountain subspecies. Pet. at 3. The head was taken off the Reservation and later determined not to be evidence of any crime. It was eventually returned to Hicks, but in an allegedly damaged condition. *Id.*

Ten months later, the second incident began when Spencer obtained another state search warrant to investigate Hicks for the same alleged illegal "fresh kill." Pet. App. at F-2 – F-4. With Tribal Court approval of the warrant and accompanied by tribal police, Spencer, Ellington, and Fitzmorris entered Hicks' allotment. Pet. App. at F-1. A search of Hicks' residence lead to the seizure of another of Hicks' forty year old, mounted sheep's head of the Rocky Mountain subspecies. Pet. at 3.

Again, the head was taken off the Reservation and determined not to be evidence of any crime. This head also eventually was returned to Hicks, but in an allegedly damaged condition. *Id.*

No charges against Hicks were ever brought by the State of Nevada, and the State has apparently ceased its investigation of him.

In July 1991, Hicks filed a civil action in Tribal Court for money damages for injuries allegedly sustained as a result of the conduct of state and tribal officials on June 12-13, 1991.[1] Pet. App. H-1 – H-17. Named as defendants were, *inter alia*, William Molini, Director of the Department of Wildlife, and Spencer, Ellington, and Fitzmorris. *Id.* at H-1. The defendants were named in both their official and their individual capacities. *Id.*

In June 1992, Hicks filed a second civil action in Tribal Court for money damages for injuries allegedly sustained as a result of the conduct on August 30, 1990 of, *inter alia*, Spencer in his official and individual capacity. *See* Pet. at 3 n.3.

Both actions alleged causes of action under tribal common law torts and violations of federal civil rights remediable pursuant to 42 U.S.C. § 1983. Pet. at 4; Pet. App. at I-4. On May 5, 1993, the Tribal Court granted the Officials' Motion to Quash in these actions on the ground of ineffective service of process under tribal law. Pet. App. at L-1 – L-2.

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[1] All claims by Hicks against the tribal officials ultimately were either voluntarily dismissed by Hicks or were resolved by the Tribal Court in favor of the tribal officials.

Cross-appeals followed to the Western Nevada Inter-Tribal Court of Appeals, of which the Tribe is a member. On May 13, 1994, a three-judge panel of the Inter-Tribal Court of Appeals reversed the Tribal Court on the service of process issue and upheld tribal jurisdiction over the actions. Pet. App. at C-1 – C-8. The cases were remanded back to the Tribal Court where they since have been stayed pending final federal court disposition of the question of tribal jurisdiction. *See* Pet. App. at B-4.

The Officials sought declaratory and injunctive relief in federal district court on the issue of tribal jurisdiction. Pet. at 4. They did not pursue in federal court their claims of ineffective service of process. *See* Pet. App. at A-20 n.3 & B-5 – B-6. In addition to Hicks, the Officials named as defendants the Tribal Court and the Associate Tribal Judge. *Id.* at B-1. Hicks and the Tribe filed answers, with the Tribe attaching a limited waiver of sovereign immunity from suit. *See* Pet. App. at A-20 n.2 & B-4. The case was presented to the district court on cross-motions for summary judgment.[2] *Id.* at B-4. On October 1, 1996, the Officials' summary judgment motion was denied and Hicks' and the Tribe's motions were granted. *Id.* at B-1 – B-24; *Nevada v. Hicks*, 944 F.Supp. 1455 (D.Nev. 1996). The district court upheld tribal jurisdiction both under a presumption of tribal jurisdiction which, in the court's view, had not been defeated in this case, and in the alternative,

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[2] Before federal district court disposition of the case occurred, Hicks moved in Tribal Court to drop the State of Nevada and all state parties in their official capacities as defendants to his actions there. The Tribal Court granted these motions also before federal court disposition of the case. *See* Pet. App. at A-5 & B-4.

under a presumption against tribal jurisdiction which the court found had been defeated in this case. Pet. App. at B-12.

The Officials appealed to the Court of Appeals for the Ninth Circuit. On May 20, 1997, the three-judge panel requested supplemental briefing from the parties on the effect of this Court's decision in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). *See* Pet. App. at A-6. After oral argument on October 7, 1997, the three-judge panel withdrew the case from submission. *See id.* at A-1. The case was resubmitted on November 4, 1999, and on November 9, 1999, a majority of the panel affirmed that there is tribal jurisdiction over Hicks' claims against the Officials in their individual capacities. *Id.* The panel majority upheld tribal jurisdiction under the presumption of tribal jurisdiction and the majority's conclusion that the presumption had not been defeated in this case. Pet. App. at A-11 – A-12. Judge Rymer dissented. *Id.* at A-16 – A-19. She was of the view that the presumption against tribal jurisdiction applied to the case, and that the presumption had not been defeated. *Id.* at A-17 – A-19. The panel issued an amended opinion on January 24, 2000, largely to clarify that the panel majority did not intend to make any rulings on the merits about the alleged misconduct or liability of the Officials. *Id.* at A-1 – A-23; *Nevada v. Hicks*, 196 F.3d 1020 (9th Cir. 2000). The Officials' petition for rehearing was denied and their suggestion for rehearing *en banc* was rejected on March 9, 2000. Pet. App. at D-1.

INTRODUCTION

Petitioners seek review of the Court of Appeals' decision below sustaining the jurisdiction under federal law of a Tribal Court to hear civil actions arising on the trust allotment land of a tribal member and brought by the tribal member against State officials in their individual capacities for alleged violations of federal civil rights and tribal tort law. The decision addressed the federal Indian law jurisdictional issue on the merits. The decision also held that the Officials' claimed affirmative defenses of absolute and qualified immunity were subject to exhaustion in the Tribal Court in the first instance but had not yet been exhausted in this case. Because the Court of Appeals fully considered and correctly decided both the jurisdictional issue and the procedural issue in this case, there is no need for review by this Court.

REASONS THE WRIT SHOULD BE DENIED

I. THE COURT OF APPEALS CORRECTLY APPLIED EXISTING FEDERAL LAW WHICH MAKES CLEAR THAT THERE IS TRIBAL JURISDICTION IN THIS CASE

A. At Least Since *Montana v. United States*, 450 U.S. 544 (1981), This Court Has Held That Tribes Generally Have Civil Jurisdiction Over The Conduct Of Non-Indians On Indian Trust Land

It is undisputed that in this case the underlying Tribal Court actions arose within an Indian reservation on the trust allotment of a tribal member. Such land is Indian

trust land "controlled by a tribe." Pet. at 24; *see also* 18 U.S.C. § 1151(c) (defining Indian trust allotments as Indian country); *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114 (1993) (holding that trust allotments are Indian country). Indian trust lands are geographic territories and sovereign jurisdictions separate from the States. *See, e.g., Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670-671 (1974), *quoting Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 560-561 (1832).[3] Thus, "State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply." *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 170-171 (1973). Along this same line, unless Congress provides otherwise, "tribes retain considerable control over nonmember conduct on tribal land." *Strate v. A-1 Contractors*, 520 U.S. 438, 454 (1997), *citing Montana v. United States*, 450 U.S. at 544, 557 (1981).

The Court of Appeals began its analysis of tribal jurisdiction by noting that "the incidents underlying the instant case occurred on Indian-owned, Indian-controlled land, over which the Tribe retained its right to exclude non-members." Pet. App. at A-9. Petitioners posit that this approach is contrary to this Court's decision in *Montana v. United States*. Pet. at 24-26. Petitioners also proffer a "conflict" between the Court of Appeals' decision below on this point and that in *A-1 Contractors v. Strate*,

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[3] Petitioners' claim, Pet. at 9, that, to allow the underlying actions to proceed in Tribal Court would "deeply wound" the federalism of the Constitution, is incorrect. Tribal sovereignty pre-dates the Constitution and is recognized in it. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978); U.S. Const. art. I, § 8, cl. 3.

76 F.3d 930 (8th Cir. 1996) (*en banc*), and/or that in *Atkinson Trading Co., Inc. v. Shirley*, 210 F.3d 1247 (10th Cir. 2000). Both of these arguments are without merit.

In *Montana v. United States*, this Court upheld tribal authority to regulate the hunting and fishing activities of nonmembers on "land belonging to the Tribe or held by the United States in trust for the Tribe." 450 U.S. at 557. The Court simultaneously refused to allow tribal regulation of hunting and fishing by nonmembers on land owned in fee simple by the nonmembers. *Id.* at 557-567. The Court found, in addition to alienation from Indians by Congress of the land itself, evidence of congressional intent to divest generally tribal power over nonmembers on that land. *Id.* at 557-564; *see also* Pet. at 24 (conceding that the ruling against tribal jurisdiction in "*Montana* . . . involved regulation of nonmember activities occurring on non-tribal land within a reservation."). In *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983), the Court held that tribal hunting and fishing regulatory authority over nonmembers in that case was exclusive of state authority, largely because the land there was Indian trust land and not "non-Indian land." 462 U.S. at 325-331.

This Court recently has unequivocally affirmed that land status is a threshold issue for analyzing tribal adjudicatory jurisdiction. As with tribal regulatory jurisdiction, a presumption in favor of tribal court jurisdiction generally applies where actions arise on Indian trust land. *See, e.g., El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 482 n.4 (1999) (refusing to apply the test for tribal jurisdiction over nonmember conduct on land alienated from Indians by Congress to "the events in question here [which] occurred on tribal lands."). A presumption

against tribal court jurisdiction generally applies to actions arising on land that has been alienated from Indians by Congress. *See, e.g., Strate v. A-1 Contractors*, 520 U.S. at 456-459. Petitioners try to show "two competing lines of authority from this Court" on this point, Pet. at 25, but the Court's cases are quite consistent with each other and the decision below fits squarely within them.

Nor is there any conflict within the lower federal courts on this point. It is true as Petitioners point out, Pet. at 25, that in *A-1 Contractors v. Strate*, 76 F.3d 930 (8th Cir. 1996) (*en banc*), a majority of the Court of Appeals for the Eighth Circuit was of the view that the presumption against tribal jurisdiction over nonmembers applied "on *any* land within a reservation." *Strate v. A-1 Contractors*, 520 U.S. at 448 (emphasis added). When this Court reviewed that decision however, while it ultimately affirmed the Court of Appeals' judgment against tribal jurisdiction, *it also set forth the correct analysis on this point which reaffirms the importance of land status in analyzing tribal jurisdiction.* Indeed, this Court's finding against tribal jurisdiction in *Strate v. A-1 Contractors* was based precisely on the Court's application of the presumption against tribal jurisdiction which in turn was triggered by the Court's conclusion that the land there – a state highway maintained pursuant to an easement granted under a federal right-of-way statute – was "equivalent, for nonmember governance purposes, to alienated, non-Indian land." 520 U.S. at 454.

This Court's decision on this point in *Strate* replaces that of the Court of Appeals there. For Petitioners to try

to resurrect the Court of Appeals' decision in *Strate* in the name of an inter-circuit conflict is disingenuous.[4]

Likewise, the decision below does not conflict with that in *Atkinson Trading Co., Inc. v. Shirley*, 210 F.3d 1247 (10th Cir. 2000). The issue in *Atkinson Trading Co.* was whether a tribe could tax the activities of a nonmember occurring on land within a reservation but "held in fee simple" by the nonmember. 210 F.3d at 1249. The Court of Appeals in *Atkinson Trading Co.* upheld the tribal tax. *Id.* at 1264. In so doing, the Court of Appeals applied the presumption against tribal jurisdiction, and also found

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[4] As noted by Petitioners, Pet. at 25, a case relied upon by the majority of the *en banc* Court of Appeals in *A-1 Contractors v. Strate* for its misunderstanding of this Court's rules regarding tribal jurisdiction over nonmembers is *South Dakota v. Bourland*, 508 U.S. 679 (1993). *South Dakota v. Bourland* involved tribal regulation of nonmember hunting and fishing on land taken by the federal government for a flood control project under specific acts of Congress. 508 U.S. at 683-687. As in *Montana v. United States*, this Court in *Bourland* found that by these acts Congress had intended to divest the tribe's power to regulate the nonmembers on this land. *Id.* at 688-694.

The Court's statement in a footnote in *Bourland* that "after *Montana*, tribal sovereignty over nonmembers 'cannot survive without express congressional delegation . . . ' " is a direct quote from the portion of *Montana* dealing with nonmembers on land owned in fee by the nonmembers. 508 U.S. at 695 n.15. Properly read, this statement must be limited to those cases where there has been divestment of tribal powers by Congress such as in the alienated lands situation. To construe it otherwise would render the portion of *Montana* dealing with Indian trust land – where tribal jurisdiction over nonmembers was upheld notwithstanding the absence of a congressional delegation of power – in conflict with *Montana* itself, as well as with cases such as *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 330-331.

that one of the presumption's exceptions, as set forth in *Montana v. United States*, 450 U.S. at 565-566, applied in that case – the nonmember had entered into a "consensual relationship" with the tribe sufficient to sustain the tax. 210 F.3d at 1261-1264.

But nothing in *Atkinson Trading Co.* conflicts with the Court of Appeals' application in the instant case of the presumption in favor of tribal jurisdiction to nonmember conduct occurring on Indian trust land. Firstly, there was no issue of tribal jurisdiction over nonmember conduct on Indian trust land involved in *Atkinson Trading Co.* The sole issue there was whether a tribe could tax nonmember activity on non-Indian fee land. Any statements by the Court of Appeals in *Atkinson Trading Co.* about tribal jurisdiction over nonmembers on trust land are thus not relevant to the court's decision there; they are dicta and do not give rise to a conflict worthy of granting *certiorari.*

Secondly, the Court of Appeals in *Atkinson Trading Co.* expressly stated that "[o]ur position is not that fee status is irrelevant." 210 F.3d at 1258 n.11.

> Fee status is largely inconsequential in this case simply because the Navajo Hotel Occupancy tax is not a severe imposition upon Appellant's guests and because the subject matter of the tax was more a commercial transaction than one affecting the actual use of Appellant's land. In sum, fee status is plainly relevant in applying the *Montana* standard and its exceptions, but it is not determinative to the extent that the analysis of the Supreme Court turns on that point alone.

Id. This clarifies that the Court of Appeals in *Atkinson Trading Co.* was actually indicating that there might be instances in which a presumption in favor of tribal jurisdiction applies to cases arising on fee land. But that indication does not cast doubt on, let alone conflict with, the Court of Appeals' decision in the instant case to apply that presumption to a case arising on Indian trust land.

B. Congress Has Not Excepted The Tribal Jurisdiction At Issue Here From This Presumption Of Jurisdiction

As stated above, actions arising on Indian trust land such as the present one trigger a presumption in favor of tribal court civil jurisdiction. Although Petitioners disagree, *see* Pet. at 16-17, the Court of Appeals in this case conducted a thorough examination for action by or intent of Congress to except the tribal jurisdiction at issue here from this presumption. Pet. App. at A-8 – A-12. The Court of Appeals searched carefully for federal statutes, agreements,[5] or other evidence of divestiture of or

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[5] In *County of Lewis v. Allen*, 163 F.3d 509 (9th Cir. 1998) (*en banc*), the Court of Appeals held that the law enforcement agreement between the tribe and a county in that case was the equivalent of a congressional diminishment of tribal power such that the presumption against tribal jurisdiction over nonmembers set forth in *Montana v. United States*, 450 U.S. at 554-567, applied to determine tribal jurisdiction in that case. 163 F.3d at 514. Petitioners here question why the Tribal Court's approval of State Court search warrants in the instant case does not likewise trigger the application of the presumption against tribal jurisdiction. Pet. at 16. To the extent that the decision below is in conflict with *County of Lewis v. Allen*, such an intra-

limitations on tribal sovereignty, exclusionary powers, or landownership control.[6] *Id.* Finding no such

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circuit conflict generally is not grounds for a grant of *certiorari* by this Court. *See* Sup. Ct. R. 10.

In any event, there is no conflict and Petitioners' analogy of the cases is flawed. The agreement in *County of Lewis v. Allen* was executed pursuant to a specific act of Congress, known as Public Law 280. Among other things, Public Law 280 provides for certain state criminal jurisdiction over Indians within reservations. *See* 25 U.S.C. § 1321. As required by Public law 280, the tribe in *County of Lewis v. Allen* took legislative action – an act of the tribal council – to enter into the agreement. This Court has held that the grant of state authority under Public Law 280 can only be effectuated by following its provisions. *Kennerly v. District Court,* 400 U.S. 423 (1971) (actions by tribe and state inconsistent with Public Law 280 provisions do not vest state with jurisdiction over Indians in Indian country).

Public Law 280 is not involved in the instant case. Nor has the Tribe here otherwise taken legislative action regarding the state's authority on the Reservation. It has long been established in Anglo-American law that only the legislative branch can waive a sovereign's immunity from suit. *See, e.g., United States v. N.Y. Rayon Importing Co.,* 329 U.S. 654, 660 (1947) (officers cannot waive sovereign immunity). Similarly, a judicial officer cannot generally diminish sovereign authority *vis-a-vis* a foreign sovereign. That is the prerogative of the legislature, as Congress recognized in Public Law 280. *See* 25 U.S.C. § 1326.

[6] Petitioners allege that the Court of Appeals erroneously made land status the sole factor in analyzing tribal jurisdiction over nonmembers. Pet. at 16-17. That allegation is incorrect. The Court of Appeals properly recognized that the analysis must include a search for divestment or limitation by Congress, *regardless of whether the land on which the nonmember conduct occurs is under tribal control or not.* Pet. App. at A-8 – A-12; *accord Atkinson Trading Co. v. Shirley,* 210 F.3d at 1261.

In fact, where land has been alienated from Indians by Congress, this Court often concludes that Congress generally

congressional action or intent, the Court of Appeals correctly concluded that "the tribal court has subject matter jurisdiction over the . . . [underlying actions.]" *Id.* at A-12. *See United States v. Wheeler*, 435 U.S. 313, 323 (1978) ("until Congress acts, the tribes retain their existing sovereign powers."); *Williams v. Lee*, 358 U.S. 217, 233 (1959) ("The cases in this Court have consistently guarded the authority of Indian governments over their reservations. If this power is to be taken away from them, it is for Congress to do it.").[7]

The underlying actions in this case arise both under tribal law and under federal law. Petitioners have not

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intended to divest or limit tribal jurisdiction over nonmember conduct on that land. *See, e.g., Montana v. United States*, 450 U.S. at 557-564. Correspondingly, where the land remains unalienated by Congress, the Court recognizes that tribal sovereignty remains particularly strong. *See, e.g., Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 438-444 (1989) (opinion of Stevens, J.) (announcing judgment of Court upholding tribal authority over "closed" Indian lands, as distinct from "open," largely alienated lands). It is thus significant that Congress has never disestablished, diminished, or opened this Tribe's Reservation. *Compare Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998) (describing the allotment, cession, and public sale of an Indian reservation's lands).

[7] The requirement of congressional divestment also responds to Petitioners' point that tribes did not historically exercise adjudicatory jurisdiction over state officers in their individual capacities. Pet. at 9-10. As this Court has held, tribes do not lose their sovereign powers through non-use. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982) ("Without regard to its source, sovereign power, even when unexercised, is an enduring presence that . . . will remain intact unless surrendered in unmistakable terms.").

argued and cannot argue in this case that Congress has divested tribal court jurisdiction over claims arising under tribal law. Tribes "have power to make their own substantive law . . . and to enforce that law in their own forums." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978), *citing, inter alia, Williams v. Lee*, 358 U.S. 217; *see also* the Indian Tribal Justice Act of 1993, 25 U.S.C. § 3601(5) ("tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments.").

Petitioners do argue to this Court that 42 U.S.C. § 1983 divests tribal court jurisdiction to adjudicate claims arising under federal law and remediable by Section 1983. Pet. at 11-12. This argument is contrary to this Court's very recent pronouncement that, unless Congress provides otherwise, "tribal courts, like state courts, can and do decide questions of federal law." *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. at 486 n.7, *citing Santa Clara Pueblo v. Martinez*, 436 U.S. at 65 ("tribal courts available to vindicate federal rights"); *see also National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 847, 852 (1985) (tribal courts can address issues such as limitations on their jurisdiction that arise under and ultimately "must be answered by reference to federal law.").

Petitioners show no evidence in 42 U.S.C. § 1983 of the requisite congressional intent. *Compare El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. at 482-487 (construing an express statutory provision preempting state court jurisdiction over nuclear tort claims as evidence of congressional intent also to preempt tribal court jurisdiction over such claims). Rather, Petitioners' theory is simply that

"[s]ilence in the congressional debates about tribal court's [sic] authority . . . can only signify absence of such intent" to allow tribal jurisdiction. Pet. at 11. This theory cannot withstand a fundamental principle of federal Indian law: "Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 n.14 (1982); *see also Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) ("statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.").[8]

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[8] Furthermore, 42 U.S.C. § 1983 addresses significant federal policies by ŏpening "the federal courts to private citizens, [and] offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation." *Mitchum v. Foster*, 407 U.S. 225, 239 (1972). This Court has noted the strong congressional policy of having this federal remedy be enforced and enforceable in courts of general jurisdiction. *See, e.g., Martinez v. California*, 444 U.S. 277, 283 n.7 (1980) (finding concurrent state court jurisdiction over Section 1983 suits); *see also Howlett v. Rose*, 496 U.S. 356 (1990) (the Supremacy Clause and Section 1983 preempt state law sovereign immunity defenses inconsistent with Section 1983). Given its strength and importance, the pursuit of federal remedies under 42 U.S.C. § 1983 in tribal courts is consistent with Congress' intent in enacting the law. It thus makes little sense to treat the operation or construction of 42 U.S.C. § 1983 in tribal courts differently than those in federal or state courts, as Petitioners suggest. Pet. at 12. "As remedial legislation, § 1983 is to be construed liberally to further its primary purpose." *Gomez v. Toledo*, 446 U.S. 635, 638 (1980).

C. It Is Well-Settled That State Sovereign Immunity From Suit Does Not Operate To Bar Actions Such As Those In The Instant Case Which Are Brought Against Officials Solely In Their Individual Capacities

Unable to prove divestment of tribal jurisdiction by Congress, Petitioners resort to arguing that tribal jurisdiction in this case is "necessarily implicitly divested" by virtue of the status of the Officials as employees of the State. Pet. at 4 & 17; *see Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152-154 (1980) (discussing the necessarily implicitly divested theory). This settled point of law needs no revisiting.

> This Court has found implicit divestiture of inherent sovereignty necessary only "where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government, as when [1] the tribes seek to engage in foreign relations, [2] alienate their lands to non-Indians without federal consent, or [3] prosecute non-Indians in tribal courts which do not accord the full protections of the Bill of Rights."

South Dakota v. Bourland, 508 U.S. 679, 699 (1993) (Souter, J., dissenting); *see also Duro v. Reina*, 495 U.S. 676 (1990) (criminal jurisdiction over Indians who are members of another tribe); *Rice v. Rehner*, 463 U.S. 713, 726 (1983) (liquor regulation).

In contrast, with respect to the present case's area of tribal court civil jurisdiction, the Court expressly has rejected the necessarily implicitly divested theory. In *National Farmers Union Ins. Cos. v. Crow Tribe*, the Court was urged to extend to civil cases the rule of *Oliphant v.*

Suquamish Indian Tribe, 435 U.S. 191 (1978), that tribal criminal powers over non-Indians have necessarily implicitly divested. The Court refused to do so.

> In *Oliphant* we . . . concluded that federal legislation conferring jurisdiction on the federal courts to try non-Indians for offenses committed in Indian Country had implicitly preempted tribal jurisdiction.
>
> . . . . For several reasons, however, the reasoning of *Oliphant* does not apply to this case.
>
> . . . . [W]e conclude that the answer to the question whether a tribal court has the power to exercise civil subject-matter jurisdiction over non-Indians in a case of this kind is not automatically foreclosed, as an extension of *Oliphant* would require.

471 U.S. at 853-855; *accord Strate v. A-1 Contractors*, 520 U.S. at 449 (tribal court civil jurisdiction over nonmembers is not "categorically restricted.").

As the Court of Appeals correctly recognized, this result is not altered where officials are sued, as in this case, solely in their individual capacities. Pet. App. at A-12 – A-14.[9] The law is clear that "officers sued in their personal capacity come to court as individuals." *Hafer v. Melo*, 502 U.S. 21, 27 (1991) (suits in federal court under 42 U.S.C. § 1983 for violations of federal rights); *Ford*

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[9] While Hicks originally named the State as a party to his actions in Tribal Court, the Tribal Court has since granted Hicks' motions to dismiss any and all claims against the State and state officials in their official capacities. A party's decision to withdraw a claim renders it moot. *Webster v. Reproductive Health Serv.*, 492 U.S. 490, 512 (1989).

Motor Co. v. Dep't of Treasury, 323 U.S. 459, 462-464 (1945) (suits in federal court under common law claims); *Johnson v. Fankell*, 520 U.S. 911, 914-915 (1997) (suits in state courts under 42 U.S.C. § 1983); *Wood v. Strickland*, 420 U.S. 308, 320-321 (1975) (discussing state court development of qualified and absolute immunity doctrines in suits under common law); *see also Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 514 (1991) (while sovereign immunity of tribe bars suit against it, "[w]e have never held that individual agents or officers of a tribe are not liable for damages in actions."). The Court of Appeals carefully limited its decision below to applying this universal rule.[10]

Petitioners concede "that individual-capacity suits against state officials . . . [are] not suit[s] against a state." Pet. at 10. Despite Petitioners' vehement argument to the

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[10] Petitioners erroneously cast the decision as covering officials sued in their official capacities. Pet. at 7, 12, 16, & 27. Petitioners' error stems from their misunderstanding of 42 U.S.C. § 1983 – which provides remedies for suits against officials in their individual capacities for actions taken under color of state law. In essence, Petitioners ask this Court to re-examine its decision in *Hafer v. Melo*, that "state officers may be held personally liable for damages under § 1983 based upon actions taken in their official capacities." 502 U.S. at 24. As the Court explained there, "the phrase 'acting in their official capacities' is best understood as a reference to the capacity in which the state officer is sued, not the capacity in which the officer inflicts the alleged injury." *Id.* at 26. This logic applies to suits brought under common law, statutes whose rights are protected by Section 1983, and constitutional provisions. *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800, 802 (1982) (involving non-Section 1983 actions against officials in their individual capacities "for damages based upon their official acts.").

contrary, Pet. at 6-10, there is thus no issue on the merits of state sovereign immunity from suit in this case. The Eleventh Amendment does not bar "a suit for money damages . . . against a state officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself, so long as the relief is sought not from the state treasury but from the officer personally." *Alden v. Maine*, 527 U.S. 706, 119 S.Ct. 2240, 2267-2268 (1999); *see also Will v. Michigan Dep't of State Police*, 491 U.S. 58, 62-71 (1989) (distinguishing suits under 42 U.S.C. § 1983 against states or officers in their official capacities, which cannot be brought, from suits against officers in their individual capacities, which can); *Kentucky v. Graham*, 473 U.S. 159, 167-168 (1985) ("unless a distinct cause of action is asserted against the [governmental] entity itself, the entity is not even a party to a personal-capacity lawsuit.").

State sovereign immunity from suit is relevant here only to the extent that, because the Officials are officers of the State, they are entitled to assert affirmative defenses such as absolute and qualified immunity. *See Malley v. Briggs*, 475 U.S. 335, 339-340 (1986) (officers sued in individual capacities under 42 U.S.C. § 1983 generally entitled to assert qualified immunity and absolute immunity); *Harlow v. Fitzgerald*, 457 U.S. 800, 807-808 (1982) (same for non-Section 1983 individual capacity suits). If they were merely private parties (or, "run-of-the-mill tort feasors," *see* Pet. at 6), these defenses would not be available to them. The Court of Appeals' unequivocal recognition of their availability eliminates the need for review by this Court on the matter.

Finally, Petitioners misleadingly assert that the decision below "diminish[es] state sovereignty." Pet. at 5; 6-9. Regarding the claims remediable by 42 U.S.C. § 1983, this Court already has expressly rejected the argument that state sovereignty is restricted by 42 U.S.C. § 1983, notwithstanding the fact that "imposing personal liability on state officers may hamper their performance of public duties" *Hafer v. Melo*, 502 U.S. at 29-31. To the same effect are the Court's cases involving individual capacity suits under common law. *E.g., Ford Motor Co. v. Dep't of Treasury*, 323 U.S. at 449-450 ("Where relief is sought under general law from wrongful acts of state officials, . . . the citizen is allowed a remedy against the wrongdoer personally.").

Moreover, it is fundamental that unless Congress provides otherwise, which in this case it has not, States have no authority over Indians on an Indian reservation, even to enforce state criminal laws against Indians for alleged crimes occurring off a reservation.

> Arizona's exercise of [its arrest and extradition laws] would clearly interfere with rights essential to the Navajo's self-government . . . This conclusion does not frustrate the State of Arizona in carrying out [state law]. It simply recognizes that Arizona has no authority, and hence no duty, to exercise extradition jurisdiction over Indian residents of the Navajo Reservation.

Arizona ex rel. Merrill v. Turtle, 413 F.2d 683 (9th Cir. 1969), *cert. denied*, 396 U.S. 1003 (1970), *citing Williams v. Lee*, 358 U.S. at 220. The State's own courts have admitted in this case that the State has no independent jurisdiction on the Reservation. Pet. App. at G-1. It thus follows that tribal

jurisdiction over the Officials in their individual capacities is consistent with State sovereignty.

Regarding the federal Indian law jurisdictional question in this case, Petitioners have failed to show that the decision below "expands" or "redefines" tribal jurisdiction in conflict with this Court's cases. They have also failed to cite to any on point cases which are good law in support of their alleged inter-circuit conflict on this issue. There is thus no justification for review by this Court on the issue.

II. ASSUMING *ARGUENDO* THAT THERE IS TRIBAL JURISDICTION, THE PROCEDURAL RULINGS BY THE COURT OF APPEALS REGARDING ADJUDICATION OF THE AFFIRMATIVE DEFENSES ARE CONSISTENT WITH THIS COURT'S DECISIONS IN THE AREAS OF JUDICIAL CIVIL PROCEDURE AND THE TRIBAL EXHAUSTION RULE

Petitioners assert that the Court of Appeals erred when it held that: 1) the merits of the claims of affirmative defenses such as absolute and qualified immunity are non-jurisdictional issues; 2) affirmative defenses are subject to exhaustion in Tribal Court in the first instance; and, 3) these defenses have not yet been exhausted in Tribal Court in this case. Pet. at 12-14 & 18-24. The Court of Appeals, however, correctly understood the nature of the defenses and followed this Court's precedent in deciding these procedural matters in this case.

A. It Is Firmly Established That Affirmative Defenses Are Non-Jurisdictional Issues

Officers sued in their individual capacities may assert absolute or qualified immunity. *Hafer v. Melo*, 502 U.S. at 28-29; *Malley v. Briggs*, 475 U.S. at 339-340; *Harlow v. Fitzgerald*, 457 U.S. at 807-808. But those assertions are not jurisdictional, they are personal affirmative defenses. *Hafer v. Melo*, 502 U.S. at 28; *Harlow v. Fitzgerald*, 457 U.S. at 815 ("Qualified immunity . . . is an affirmative defense that must be pleaded by a defendant official."); *see also Jefferson County v. Acker*, 527 U.S. 423, 119 S.Ct. 2069, 2083 (1999) (Scalia, J., dissenting) (suggesting that it would be "an odd result" to subsume the merits of the defense of qualified immunity within the "threshold jurisdictional question"); *Gomez v. Toledo*, 446 U.S. 635, 640 (1980) (while qualified immunity is an available defense, it is not relevant to the existence of a cause of action).

Petitioners offer no pertinent authority for overturning this settled law. The cases on which they rely, Pet. at 12-13 & 19-24, were suits against sovereigns or officials in their official capacities and thus involved issues of sovereign immunity from suit. That is not this case. Petitioners' mere desire, Pet. at 12, that "qualified immunity could and should be given a jurisdictional import. . . . " is not worthy of this Court's review.

B. To Ensure Uniformity Of Federal Law, Federal Court Review After Exhaustion In Tribal Court Of The Section 1983 Affirmative Defenses Is Appropriate

"[W]e repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991). Generally, this means before trial and even before certain pre-trial stages. *Mitchell v. Forsyth*, 472 U.S. 511, 527-529 (1985) (immunity defenses should be resolved before trial); *Harlow v. Fitzgerald*, 457 U.S. at 818 (before discovery). In any event, "the trial court . . . must exercise its discretion so that officials are not subjected to unnecessary and burdensome discovery or trial proceedings." *Crawford-El v. Britton*, 523 U.S. 574, 597-598 (1998).

The decision below is entirely consistent with this precedent. The Court of Appeals aptly recognized that in this case, the earliest possible adjudication of the merits of the affirmative defenses will occur after final disposition of the jurisdictional issue, assuming that jurisdiction is upheld. While the Tribal Appellate Court instructed the Tribal Court to "set a trial date," Pet. at 18 n.4; Pet. App. at C-5, the Court of Appeals, Pet. App. at A-12 – A-15, undoubtedly meant for the Tribal Court to follow this Court's cases and engage in the affirmative defense adjudication before trial or discovery, to ensure that the Officials are not subjected to "unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." *Siegert v. Gilley*, 500 U.S. 226, 232 (1991).

To ensure uniformity, the right to federal court review of Tribal Court interpretations of the federal law

affirmative defenses is appropriate once tribal remedies have been exhausted. *See National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. at 856 (indicating that, in addition to federal court review of tribal jurisdictional determinations, federal courts may review the merits of claims in tribal court); *see also Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 19 (1987) (such review should be deferential, not a "relitigation" of non-jurisdictional issues "raised . . . and resolved in the Tribal Courts.").[11]

C. The Affirmative Defenses Have Not Been Exhausted In This Case Because The Tribal Court Has Not Yet Ruled on The Merits Of The Defenses

The Court of Appeals properly ruled that the Tribal Court should address the merits of the affirmative

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[11] To the extent that the affirmative defenses to the non-federal claims are also non-federal in nature, the federal courts should not disturb Tribal Court interpretations of purely tribal law. *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. at 16 (1987) ("Adjudication of such matters by any nontribal court also infringes upon tribal lawmaking authority, because tribal courts are best qualified to interpret and apply tribal law."); *see also City of Timberlake v. Cheyenne River Sioux Tribe*, 10 F.3d 554, 559 (10th Cir. 1993), *cert. denied*, 512 U.S. 1236 (1994) ("we defer to the tribal courts' interpretation [of tribal law] even though non-Indians are involved"); *Sanders v. Robinson*, 864 F.2d 630, 633 (9th Cir. 1988), *cert. denied*, 490 U.S. 1110 (1989) (where the highest tribal court has adjudicated an issue of purely tribal law, "[t]hat court's interpretation of tribal law is binding on this court"); *accord Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 630 n.3 (1988) (federal courts should defer to decisions on purely state law made by the highest state court).

defenses in the first instance because it correctly recognized that there has been no such ruling yet. Pet. App. at A-12 – A-15. Petitioners, however, argue that the Tribal Court reached the merits of the issue, and thus the issue has been exhausted and is ripe for federal court review. Pet. at 13 & 18-23. Petitioners' view is incorrect and the Court of Appeals' is correct.[12] The Court of Appeals affirmed the holding of the district court in this case that the Tribal Court has not ruled on the merits of the affirmative defenses. Pet. App. at A-12 – A-13. The district court in this case was especially unswayed by Petitioners' argument on this point that they "raised, argued and briefed [the point] in the tribal court proceedings, [but] the tribal court failed to adequately address these arguments when they were presented, and [thus] erred as a matter of law by denying them immunity." Pet. App. at B-16. "The tribal court did not hold an evidentiary hearing or make definitive findings of fact or conclusions of law on the application of the qualified immunity defense to the facts of this case." *Id.* Thus, the Court of Appeals correctly held that, assuming tribal jurisdiction is upheld, the affirmative defenses remain to be "considered on the merits by the tribal court" in the first instance. Pet. App. at A-13.

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[12] Petitioners also contest the Court of Appeals' upholding of the district court's ruling that the issue of whether Hicks has properly stated a claim against William Molini, the Director of the Nevada Department of Wildlife, in his individual capacity, has not yet been exhausted in Tribal Court. Pet. at 13; Pet. App. at B-17. However, the Court of Appeals was correct on this issue and thus properly affirmed the remand of this issue to the Tribal Courts. Pet. App. at A-15.

CONCLUSION

For the reasons stated above, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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